NO. 22067

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ARNOLD DEAN LAHRS,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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I

JURISDICTIONAL STATEMENT

Appellant, ARNOLD DEAN LAHRS (hereinafter referred to as defendant) was indicted by the Federal Grand Jury for the Southern District of California, Central Division on November 23, 1966. He was charged with embezzling $26,287.55 from First Federal Savings and Loan Corporation of Long Beach on or about February 25, 1966 in violation of Title 18, United States Code, Section 657 (C.T. 2) [1/].

Defendant pleaded not guilty at his arraignment on January

1/ "C.T." refers to Clerk's Transcript of Proceedings.

9, 1967 (R. T. 1105-06). [2]

On April 19, 1967, defendant was found guilty after a seven day jury trial before the Honorable Jesse W. Curtis, United States District Judge (C. T. 42).

Defendant was sentenced to the maximum of five years imprisonment under Title 18, United States Code, Section 4208(c), on June 19, 1967 (C. T. 60). A motion to appeal in forma pauperis was granted (C. T. 65-66).

The District Court had jurisdiction under Title 18, United States Code, Sections 657 and 3231.

This Court has jurisdiction to review the judgment under Title 28, United States Code, Sections 1291 and 1294.

II

STATEMENT OF FACTS

The bank involved was the First Federal Savings and Loan Association of Long Beach (hereinafter referred to as bank) (R. T. 223). On the morning of Friday, February 25, 1966, defendant prepared a cash balance sheet which showed that $26,000 was in the vault cash drawer (R. T. 229-232). On Monday morning, February 28, 1966, the money was missing. The total loss was $26,287.55 (R. T. 240-244).

The parties stipulated that the bank was federally insured within the meaning of Title 18, United States Code, Section 657

2/ "R. T." refers to Reporter's Transcript of Proceedings.

(C. T. 2, R. T. 148).

The following is a summary of the evidence presented by the government to prove that defendant took the money:

Defendant was employed as operations officer of the bank from May 1, 1962 to February 25, 1966 (R. T. 171). In that capacity he was issued a key to the front door and given the combination to the walk-in vault (R. T. 172). He also had one of two existing keys to the vault cash drawer which was located inside the vault (R. T. 172-173, 214, 232-33). The other key was kept in a safe deposit box in another vault and could not be obtained without the assistance of two other employees (R. T. 214-215).

On Monday, February 21, 1966 defendant was asked to account for his unexplained absence on Wednesday, Thursday and Friday of the previous week (February 16, 17 and 18, 1966). His explanation was unsatisfactory and the bank president said he would discuss the matter with the board of directors (R. T. 149-152). On Wednesday, February 23, 1966, defendant was forced to resign effective the end of the month. It was agreed that Monday, February 28, 1966, would be his last day (R. T. 152-154). Defendant rode to and from work on February 21, 23 and 24, 1966 with a co-worker, Marie Novotny. February 22, 1966 was a holiday (R. T. 225-228).

On Friday, February 25, 1966, the bank was open from 8:30 A. M. to 6:00 P. M. The defendant was assigned to the late shift which worked from 10:00 A. M. to 6:00 P. M. (R. T. 174). He rode to work with Miss Novotny who arrived at his apartment

at 9:15 A. M. Defendant did not come out when she sounded the car horn. She rang the doorbell and defendant came to the door in his shirt and trousers. There was a slight cut on his right arm which has since healed without a scar. He seemed a little more depressed than usual, possibly because he had been drinking. It was apparent that he blamed the bank for terminating his employment. Defendant treated the cut, finished dressing, and they drove to the bank (R. T. 228, 247-250, 656).

Defendant prepared a cash balance sheet or cash count of the money in the vault cash drawer soon after arriving at the bank. His count showed a total of $26,000 in bundled money (R. T. 229-232). Around 11:00 A. M. he turned in his front door key (R. T. 175, 210).

Defendant was out of the bank from noon to 1:30 P. M. When he returned he asked Marie Novotny to recount the money in the vault cash drawer. She objected to this unusual procedure but agreed to it when defendant threatened to strike her (R. T. 235-237). Defendant gave the key to the vault cash drawer to Marie Novotny around 1:30 P. M. and it remained in her possession until she placed it in its usual hiding place in the vault shortly before she left the bank. She opened the vault cash drawer at 4:00 P. M. and nothing was missing (R. T. 254-256).

Another employee entered the main vault about 5:50 P. M., a few minutes earlier than usual, and saw defendant standing at the vault cash drawer which was open. She said:

> "I apparently startled him when I came in because he turned around quickly and closed the door and appeared very nervous.

I was walking into the vault towards where the cash drawer was. He quickly came out going out of the vault. We met each other. Very nervously he went from one side to the other and kind of laughed and left very quickly. (R. T. 298-299).

Marie Novotny saw defendant close the vault at 6:15 P. M. He said he would not ride home with her and she left the bank. When she last saw defendant he was holding a black attache case (R. T. 238-239). He carried it with him when he left the bank. He was the last employee to leave (R. T. 290-291, 294).

The bank is unguarded on weekends (R. T. 291). Defendant had a habit of entering the bank on weekends and cashing personal checks with the money in the vault cash drawer. When Marie Novotny asked him about this on one occasion, "he said that he had run short of funds over the weekend and had taken the liberty of entering the institution and cashing a check." (R. T. 244-245). This was contrary to bank policy (R. T. 272).

On Monday, February 28, 1966, Marie Novotny arrived at defendant's apartment, but he was not home and she went to work without him. Defendant did not show up for work at all that day and the daily count of the vault cash drawer revealed a shortage of $26,287.55. The five and one dollar bills and some change had been left behind (R. T. 239-243).

Some time between Friday and Monday the defendant and the money disappeared. The evidence showed that he was heavily in debt. He owed almost $2,000 on recent cash loans (R. T. 87-

89, 94-97), several hundred dollars in delinquent property taxes (R. T. 135-142), $238.83 to department stores (R. T. 101-102, 107-109), $138 on a stereo (R. T. 114-116), and had a mortgage on his residence (R. T. 123, 134-135).

On his last day at work, Friday, February 25, 1966, he withdrew the remaining balance in his savings account (R. T. 183-184), emptied his safe deposit box (R T. 187-188) and cashed two checks for a total of $240. One of the checks bounced (R. T. 191-192, 194).

Defendant appeared in Chicago, Illinois using an alias, Tom Osborne, during the first week of March, 1966. He told William C. Nagle whom he met at the Mayor's Row Bar, that he was a grain merchant from Lincoln, Nebraska (R. T. 311-314). The next day defendant and Nagle visited several bars and Nagle's apartment. Defendant offered to buy a revolver and an extra British passport from Nagle who had valid passports from three countries (R. T. 320-321). Defendant was unhappy with his accomodations at the Sherman House Hotel and decided to move to the Drake Hotel later in the day. Nagel said:

> "A. . . . (Defendant) had a large suitcase and a little one, a little attache case. He put those in my car and he excused himself for a moment. He said he had to walk across the street to the Greyhound Bus Station. I stayed in the car. He came back and he had a little attache case which was almost similar to the one that he had brought out of the hotel.

"Q. Do you remember anything about the color of the one he brought back from the Greyhound Bus Depot?

"A. I think it was either dark gray or black.

* * * *

"A. I joked with him that he had taken two suitcases over there and left this little one in the Greyhound Bus Station which was a short distance. He said, 'Well, this one is very important. I had it locked down there.' While I was driving off from the curb I glanced over at him and he was opening the little suitcase at that time. . . .

* * * *

"A. I noticed that he had lots of money in the suitcase. There were, from my recollection, $100 bills, $50 bills, $20 bills, and $10 bills. They were stacked along the top of the suitcase.

* * * *

"Q. When you say stacked, will you tell us, please, how?

"A. Well they were in paper wrappers. . . .

* * * *

"Q. You observed all the money. What was said next?

"A. Well, I said, 'My God! Where did you get all that money?' You know I just laughed.

He laughed and said, 'I stole it'. "

(R. T. 322-325).

Defendant discussed the purchase of a bar and offered Nagle $1,000 for the use of his name after learning that Nagle did not have a criminal record (R. T. 327-328). Later, while very drunk defendant placed $2,000 cash in Nagle's pocket. Nagle returned it, saying:

> "'You know, Tom, I have got to give you back this money. You are going to be looking for it tomorrow. You won't remember what you did with it.'
>
> [Defendant] said that is all right, that he wasn't stoned anyway. He laughed again. 'It was stolen anyway' " (R. T. 329-330).

Nagle found a man's wedding ring with some initials on it in defendant's hotel room. Defendant correctly identified his wife and the date of his marriage but told Nagle he "was being too nosey" when questioned about the intitials A. D. L. (R. T. 329-330, 658-659, 708-709).

The next day defendant told Nagle he was leaving for New York (R. T. 331). On the following Thursday, he was again in Chicago and Nagle joined him on a quick trip to Miami at defendant's expense (R. T. 332-333). They flew first class (R. T. 369), stayed at the Dural Beach Hotel and spent substantial sums for food and entertainment (R. T. 334-336). Defendant always paid cash, using $20, $50, and $100 bills. No matter how big the bill he allowed the waitress to keep the change (R. T. 336-338).

Records were introduced which showed that defendant stayed in deluxe hotels in Chicago (R. T. 381-383), St. Louis (R. T. 386-390, 403-406), Washington, D. C. (R. T. 393-399, 409-411, 418-428, 422), San Juan (R. T. 429), and Cape Cod (R. T. 437, 444-446), before renting an apartment with Jerry Bowden in Washington, D. C. at the end of July, 1966. He admitted these trips (R. T. 545). The record indicates that he paid all of his bills with cash. Two witnesses recalled that he used $50 bills (R. T. 437, 446).

On April 1, 1966, defendant met Jerry Bowden in Washington, D. C. He introduced himself as Thomas Osborne and said he was a lawyer from Nebrasks in town on business (R. T 456-457). Later defendant told Bowden that he was from Long Beach and had originally been from Nebrasks. Evidence was introduced which confirmed his former residence as Fremont, Nebraska (R. T. 568).

In September or October, 1966, defendant called his sister in Long Beach. He knew he was in trouble and refused to disclose his location (R. T. 585).

On November 17, 1966, defendant was arrested in Washington, D. C., while using the alias, Thomas Osborne. He readily admitted that his true name was Arnold Dean Lahrs (R. T. 536-538). A search of his apartment disclosed bankbooks for Arnold Dean Lahrs and Thomas Osborne (R. T. 539). Defendant was taken to Federal Bureau of Investigation headquarters where he said that he had been employed by the bank as operations officer

and left in the latter part of February, 1966. He stated that his last day at work was a Friday and that he was scheduled to work on Monday, February 28, 1966, but did not appear. He admitted that the money he had in Chicago could not have been his own and that it could logically be assumed that he took the money from the bank. Later he mentioned that he was supposed to attend a birthday party on his last night in Long Beach and this was confirmed by his sister (R. T. 542-544, 583-584).

Defendant testified that he did not recall threatening to strike Marie Novotny in the bank vault or making a cash count on February 25, 1966 (R. T. 655). However, he remembered turning in his front door key and closing his safe deposit box, although claiming that he did so on Wednesday, February 23, 1966 (R. T. 655-657, 704).

Defendant interposed the defense of not guilty by reason of insanity. His primary contention was that he had no memory of events from late February 24, 1966 until he woke up in Chicago (R T. 649-650). The following evidence was introduced concerning his mental condition:

In December, 1958, seven years before the crime, he was taken to Long Beach Hospital when he became violent while drunk. On the way to the hospital he threatened to jump from the car and said that he had previously tried to jump off a pier (R. T. 561-563). During his hospitalization from December, 1958, to January, 1959, defendant was given six electric shock treatments. He received another shock treatment on October 30, 1959 (R. T.

601-603). On February 18, 1962, defendant was taken to the hospital, apparently in a straitjacket, when he again became violent while drunk (R. T. 632-634, 741, 799-800). Hospital records show an entry for February 19, 1962 which reads: "He can be discharged today. No evidence of psychosis" (R. T. 800).

In June, 1963, defendant was admitted to the Harriman Jones Clinic and soon transferred to Long Beach Hospital (R. T. 564, 751-754, 802-804) after his supervisor at the bank recommended a physical checkup (R T. 697). He had forgotten to close the bank vault one evening (R. T. 622-623) and later sent an unsigned note and a check out of the bank together (R. T. 623-625). Defendant testified that someone else once left the vault open and said that the incident with the note resulted from errors by other employees. He took the blame as their supervisor (R. T. 700-704).

Later that year defendant apparently attempted to run over his brother while very drunk. The incident was never discussed again by them (R. T. 593-597).

Defendant was a heavy drinker. He stated that he "had been making a habit of drinking a great quantity of liquor during the evening" during the period preceding the embezzlement (R. T. 705). He was arrested for drunk driving in 1958, 1959 and 1963 and his license was revoked (R. T. 738).

Defendant was dismissed because of his failure to report for work on February 16, 17 and 18, 1966 (R. T. 151, 273). He testified that his absence was due to his drinking (R. T. 645). On

February 16, 1966, he called Marie Novotny at 4:00 A. M. and asked her to pick him up at the Greyhound Bus Station in Long Beach. Although extremely inebriated, he gave her a check for $100 to cash when the bank opened. She agreed to meet him with the money later that morning and eventually did so. That evening, at his request she met him at a bar and took him home. On the evening of February 17, 1966, he called her to apologize and remembered everything that had happened the previous morning (R. T. 273-276).

Defendant had been drinking on February 24 and 25, 1966, when Marie Novotny arrived to drive him to work. She testified that the liquor did not affect him on February 25, although he smelled of alcohol throughout the day (R. T. 247-248, 252-253), and while at work he had two brief crying episodes (R. T. 250-251).

William Nagle said that defendant did not recognize him when they passed on the street in Chicago subsequent to their trip to Miami (R. T. 337-338, 340).

Defendant lived with Jerry Bowden from July 1966 until his arrest on November 17, 1966. Bowden testified that defendant was often violent while very drunk and once slashed a window screen, apparently in preparation for a jump from their ninth floor apartment (R. T. 470, 489-492).

Dr. Alvin E. Davis, a psychiatrist testified for the defense. He examined defendant on February 7 and March 7, 1967. Each examination lasted about one hour. On March 8, 1966, he

reported that defendant was "legally sane at time of offense, though professedly amnesiac for that time caused by drinking and emotional reaction to termination of employment." (R. T. 782-783, 789). Later he changed his opinion and at the time of trial stated that defendant was insane based upon the last portion of the insanity test which he quoted:

> "His will, the governing power of his mind, has been so completely destroyed that his actions are not subject to it but are beyond his control." (R. T. 778-781, 838)

Several factors contributed to his change of opinion. He learned that the defendant had been given seven electric shock treatments and 124 sodium penothal interviews rather than one shock treatment and 59 interviews as the defendant had reported (R. T. 790-791). In addition he examined records from several hospitals, although he had most of this information when he gave his original opinion (R. T. 790-806). He also relied on several facts which were not in evidence or were contrary to the evidence. For example, he stated that defendant's brother reported that defendant did not recall attempting to run over him (R T. 806). The brother testified that he never discussed the incident with defendant (R. T. 597-598). Also, Dr. Davis said that defendant's sister reported that defendant did not subsequently recall telephone conversations with her (R. T. 795, 807-808). In fact she testified that defendant often called while drunk and they never mentioned the conversations when he was sober. However, she

did discuss one call with defendant and he had a detailed recollection of it (R. T. 569-570). The doctor also stated that defendant's co-worker, apparently Marie Novotny, reported that defendant did not remember several incidents on February 23, 24 and 25, 1966 (R. T. 795, 808-811). The only testimony in the record is her statement that she did not see him from February 25, 1966 to the trial. She did state that he later remembered everything about an incident which occurred while he was drunk on February 16, 1966 (R. T. 275-276). The misinformation was important to his change of opinion, although Dr. Davis admitted that he did not know whether it was in the record (R. T. 823). He said that the information from defendant's sister and brother and Marie Novotny came from defense counsel and not directly from those persons (R. T. 810).

Dr. Seymour Pollack, a psychiatrist testified for the government. He examined the defendant on January 24 and February 9, 1967 for a total of three hours and formed the opinion that defendant was sane (R. T. 852, 883). Dr. Pollack said that defendant was emotionally disturbed and a "heavy, severe and chronic alcoholic". He noted that defendant had a "rather selective memory excluding mainly that Friday, Saturday and Sunday (February 25, 26 and 27, 1966)." He also said that defendant was obviously aware of his true identity while continuing to use the alias, Tom Osborne (R. T. 856-857) and that the blackouts described by defendant are very common among heavy drinkers (R. T. 858-859). In Dr. Pollack's opinion, it is highly

unlikely that defendant was in a dissociative state at the time of the embezzlement (R. T. 880-882, 895). He added that in over twenty years of practice he had seen only one person in a true dissociative state and even that was seriously questioned. The others faked this condition which he said is similar to the Three Faces of Eve situation, sometimes referred to as multiple personalities (R. T. 863-866).

Dr. Pollack said that he was furnished information by defense counsel and Assistant United States Attorney, Jo Ann Dunne (R. T. 935). The information which he received from Mrs. Dunne included hospital records, an electroencephalographic report which described defendant as perfectly normal and information which corresponded to the testimony of William Nagle (R. T. 949-951, 957). Dr. Pollack also was told that defendant admitted that he took the money (R. T. 950-951). The court pointed out that this was not inconsistent with the testimony of William Nagle and FBI Agent Buscher (R. T. 952-953). The defense contended that it was primarily the testimony of FBI Agent Matthew, who stated what he had been told by Jerry Bowden, and that this could be considered for impeachment only (R. T. 951-953). The court ruled that the testimony was in evidence (R. T. 951).

The following is a brief summary of the procedural background relating to some of the issues raised by defendant:

On January 9, 1967 defendant requested copies of statements of prospective witnesses which were contained in prosecu-

tion files. Defense counsel admitted that the request was contrary to the Jencks Act, Title 18, United States Code, Section 3500, and the court denied the motion (R. T. 1106-1108). The government furnished copies of FBI reports and statements of witnesses in advance of their testimony as a courtesy to the defense (R. T. 154-155, 267).

The court called Jerry Bowden as the court's witness, over defense objection, after being advised that he had given contrary statements (R. T. 352-353). The court explained this procedure to the jury, saying that it appeared to the court that his testimony would be material although neither side wished to be bound by it (R. T. 454-455).

Mr. Bowden testified that he did not recall telling the FBI that defendant admitted taking the money. However, he did recall that the defendant said he was charged with more money than he could possibly have taken and that he was glad it was over (R. T. 475-480). FBI Agent Matthew testified that Bowden said defendant had admitted taking some money from a bank in California (R. T. 502). The court told the jury that Agent Matthew was "called for a very narrow purpose, and that is impeachment only" and defense counsel agreed (R. T. 502). The court also stated that there was considerable doubt "whether the testimony of this witness impeaches in any degree or to what degree it impeaches the testimony of Bowden" (R. T. 506).

Defendant also objected to the testimony of FBI Agent Buscher concerning a statement given after his arrest. The

defendant was arrested at his apartment around 9:00 P. M. and advised of his rights. "He said that he did not wish to discuss the matter at this time." (R. T. 537-539). He was taken to the FBI field office and another conversation was held at 10:20 P. M. Defendant admits that he read and signed a waiver of his constitutional rights before the second conversation (Government Exhibit 35) (R. T. 531, 541). The court overruled the objection (R. T. 534).

Dr. Pollack testified that he had received information from defense counsel and the Assistant United States Attorney (R. T. 935). The defendant moved to strike his opinion since it may have been based in part on information concerning an admission to Bowden which, he contended, was in the record as impeachment only. The court denied the motion stating that any discrepancy between the evidence and the facts relied on by the doctor could be argued to the jury (R T. 867-872, 931-933, 951-953). The government moved to strike the testimony of Dr. Davis since his opinion was based on facts not in evidence and the court denied the motion (R. T. 953).

Defendant proposed an insanity instruction based on the American Law Institute (A. L. I.) test (C. T. 36). The court refused to give it and instead gave an instruction which substantially followed Mathes and Devitt, Section 10. 14 (R. T. 1060-1062).

III

QUESTIONS PRESENTED

1. Did the trial court commit prejudicial error, on January 9, 1967, when it refused to allow defendant to inspect written statements and reports of prospective witnesses contained in the government's files?

2. Did the trial court commit prejudicial error when it called Jerry Bowden as the court's witness and allowed him to be impeached by a prior inconsistent statement?

3. Did the trial court commit prejudicial error when it admitted testimony concerning postarrest admissions by defendant?

4. Did the trial court commit prejudicial error by refusing to strike the testimony of Dr. Pollack or grant a mistrial when defendant contended that part of his testimony was based on information not in evidence?

5. Did the trial court commit prejudicial error when it refused to give defendant's proposed instruction on insanity which embodied the American Law Institute test?

IV

ARGUMENT

A. THE TRIAL COURT CORRECTLY REFUSED TO ALLOW DEFENDANT TO INSPECT WRITTEN STATEMENTS AND REPORTS OF PROSPECTIVE WITNESSES CONTAINED IN THE GOVERNMENT'S FILES.

Defendant contends that his Sixth Amendment right to confrontation of witnesses was abridged when he was denied the right to inspect government files prior to his trial. The trial court ruled that the statements requested were covered by the Jencks Act, Title 18, United States Code, Section 3500, which provides that statements or reports of witnesses, other than the defendant, are not available for inspection until after the witness has testified on direct examination. Defense counsel agreed with the trial court's view of the Jencks Act at that time. The Supreme Court has upheld the constitutionality of the Jencks Act. Scales v. United States, 367 U.S. 203, 257-58 (1961). See Palermo v. United States, 360 U.S. 343 (1959); Jencks v. United States, 353 U.S. 657 (1957). This Court upheld the denial of a similar request in Ogden v. United States, 303 U.S. 724, 734 (1962) stating:

> "There is no support for such sweeping discovery under the Federal Rules of Criminal Procedure, the Jencks decision or the Jencks Act. The legislative history of the Jencks Act makes it

explicitly clear that Congress intended to preclude just such broad disclosure of the government's investigative files as the defendant sought here. . . . As to statements relating to the subject matter of the testimony of potential government witnesses not yet heard, the demand was premature. For the same reason it was not error to deny defendant's pre-trial Jencks Act demands for statements of this and other witnesses."

In this case the Assistant United States Attorney provided defendant with copies of Jencks Act statements before each witness testified, although clearly not required to do so. Defendant now contends that he was denied effective cross-examination because he did not have the statements prior to trial. The only example of alleged prejudice cited concerns the testimony of William Nagle who said that he helped defendant move from the Sherman House Hotel to the Drake Hotel in Chicago. The government introduced records of the Sherman House Hotel which confirmed defendant's stay, but defendant is now informed that there are no records under his own name or his alias at the Drake Hotel. The absence of these records was clearly before the jury and, as the trial court held, this slight conflict did not affect a material issue (R. T. 1082).

Finally the record shows that Nagle did not give a statement to the FBI (R. T. 346). Nagle's three-page affidavit of March 21, 1967 (which was obviously not available on January 9,

1967) was given to defense counsel for cross-examination (R. T. 356, 365, 374-377).

Defendant contends that recent Supreme Court cases have extended the right of cross-examination. However, none of these cases involved the Jencks Act. The record shows that defense counsel was given a full opportunity to cross-examine every government witness. No more is required.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT CALLED JERRY BOWDEN AS THE COURT'S OWN WITNESS AND THEN ALLOWED JERRY BOWDEN TO BE IMPEACHED BY THE TESTIMONY OF FBI AGENT MATTHEW.

After hearing from both sides the trial court ruled, over defense objection that it would call Jerry Bowden as the court's own witness (R. T. 352-353). The trial court told the jury that the "witness may have some testimony which would be material and of interest, not only of interest but would have a bearing on this case, and for that reason the court is going to call this witness as the court's witness. Both parties will be entitled to cross-examine the witness as if he were an adverse witness and neither party will be bound by his testimony . . . ." (R. T. 454-455) The government was reluctant to call Bowden when it learned that he intended to testify contrary to his original statements (R. T. 352). The record establishes the materiality of Bowden's testimony to both sides. He provided information about the

defendant's activities from April 1, 1966 until defendant's arrest on November 17, 1966. In addition he testified at length concerning defendant's mental condition and a possible suicide attempt, which was relevant to the defense of insanity. In Arnold v. United States, 382 F. 2d 4, 8 (9th Cir. 1967), this Court said:

> "It should be noted that in this case it cannot be said that the government called the witness solely to inject prior extrajudicial statements into the record. [The witness] was also examined as to her associations with appellant, and her testimony that she had met appellant on a number of occasions prior to the offense was important to the government's case."

The statement clearly applies to the testimony of the court's witness in this case.

The practice of calling a witness as the court's witness is recognized as proper in the federal courts. In the leading case of Litsinger v. United States, 44 F. 2d 45, 47 (7th Cir. 1930), the court said:

> "The second and third assignments of error relied upon attacking the action of the court in calling and examining [three witnesses] and in permitting the government to impeach them by their previous inconsistent statements . . . ."
>
> * * * * * * * * * *
>
> "The rule which permits the trial court to call and examine a witness at the request of the government's attorney is quite a reasonable one and is well

recognized . . . ."

* * * *

"Nor was there error committed in the extent of cross-examination and in the impeachment by proof of inconsistent statements."

Other cases contain similar statements of the rule. Troublefield v. United States, 372 F. 2d 912, 916 n. 8 (D. C. Cir. 1967); Smith v. United States, 331 F. 2d 265, 269-275 (8th Cir. 1964); cert. denied 379 U. S. 824; United States v. Browne, 313 F. 2d 197, 199 (2nd Cir. 1963), cert. denied 374 U. S. 814; United States v. Lutwak, 195 F. 2d 748, 754-55 (7th Cir. 1952), affirmed 344 U. S. 604 (1953). See Annot., Court's Witnesses (Other Than Expert) in Criminal Prosecution, 67 A. L. R. 2d 538. Since it was proper to call Bowden as the court's witness it was proper to impeach him with his prior inconsistent statement. Litsinger v. United States, supra.

None of the cases cited by defendant resulted in a reversal of the conviction and only one of them, Fournier v. United States, 58 F. 2d, 3 (7th Cir., 1932), involved the calling of witnesses by the court. In Fournier the Seventh Circuit's primary criticism was the failure of the record to explain why the witnesses were called by the court, supra, 58 F. 2d at 6-7, and it was held that the error was not prejudicial. The trial court clearly did not abuse its discretion in this case.

The trial court did not commit prejudicial error when it allowed the court's own witness, Jerry Bowden, to be impeached

by the testimony of FBI Agent Warren Matthew. As the court's witness he was subject to impeachment by either party. Defendant implies that the court erred when it failed to tell the jury that Agent Matthew's testimony should be considered only as impeachment of the witness Jerry Bowden and not as substantive evidence. However, the record shows that during Agent Matthew's testimony the following colloquy took place:

> "THE COURT: Very well. But this witness has been called for a very narrow purpose, and that is impeachment only.
>
> "MR. BAIN: That is correct." (R. T. 504)

Shortly thereafter the court said:

> "It is up to the jury to determine, of course, whether the testimony of the witness Bowden has been impeached by the testimony of this witness . . . ." (R. T. 506)

Defense counsel did not request additional instructions.

The weakness of defendant's position on this point is apparent from the record. During defendant's own case he called FBI Agent Richard George to establish that two government witnesses testified contrary to their original statements to the FBI. The Assistant United States Attorney, Jo Ann Dunne, promptly requested an instruction limiting the testimony to impeachment. The record reads:

> "THE COURT: The testimony of Mr. George is in the way of impeachment and his testimony was

admitted for the purpose of impeaching, if it does, the statement of the other witnesses who have testified. You may not consider his testimony for any other purpose but the purpose of impeachment.

"MR. BAIN: Your Honor, may I interpose a comment at this time?

"THE COURT: Yes.

"MR. BAIN: I believe under the changes in the California Code that the evidence can be considered as substantive evidence. That was one of the major changes in the field of impeachment.

"THE COURT: I think perhaps you are right.

"MRS. DUNNE: I will go along with that. I would be delighted to go along with that. Then impeaching or contradictory evidence is admitted substantively?

"THE COURT: All right." (R. T. 611-612)

It is clear from the record that defense counsel asked the court to apply California Evidence Code, Section 1235, which does treat prior inconsistent statements as substantive evidence. Now defendant insists that the trial court erred when it granted his request! This Court should hold that defendant has waived his right to claim error on this ground.

A recent case which may be contrary to the position of the government is People v. Johnson, 68 Cal. Rptr. 599 (S. Ct. 1968) which holds the Section 1235 of the Evidence Code is unconstitutional when applied to criminal cases because it is a denial

of the right to confrontation of witnesses. However, Johnson does not preclude the introduction of impeaching testimony when it is limited to impeachment. The record in this case supports two conclusions: (1) the testimony of Jerry Bowden was limited to impeachment; or (2) defendant waived his right to complain of its use as substantive evidence.

C. THE TRIAL COURT DID NOT COMMIT PREJUDICIAL ERROR WHEN IT ALLOWED FBI AGENT BUSCHER TO TESTIFY TO THE POST-ARREST ADMISSIONS OF DEFENDANT.

Defendant was arrested at his apartment in Washington, D. C. at 9:00 P. M. on November 17, 1966 by FBI Agent Bernard Buscher. He was advised of his constitutional rights and questioning ceased when he said "He did not wish to discuss the matter at this time." (R. T. 536-539) Defendant testified that he was allowed to shower, shave, change clothes, finish his laundry, obtain some cash and leave a note for his roommate, Jerry Bowden, which said that he had been arrested and gave a number where he could be reached (R. T. 681-682). Defendant was taken to the Washington, D. C. field office of the FBI and shown a waiver of his constitutional rights (Government Exhibit 35) which, according to his testimony, he read and signed (R. T. 531, 540-541). The conversation began at 10:20 P. M. and continued for a "little over an hour." (R. T. 540, 546). He was described as very rational, very neatly dressed and normal, although slightly

nervous (R. T. 557). Defendant claimed that he was influenced by threats to prosecute his roommate for harboring a fugitive (R. T. 688). Agent Buscher emphatically denied that this was discussed (R. T. 553-554). The trial court (R. T. 534) and, it must be assumed, the jury found that the statements were voluntary. The procedure followed was in accordance with the practice approved by this Court. Kear v. United States, 369 F. 2d 78, 84 (9th Cir. 1966).

Defendant insists that the two interviews were in reality one continuous questioning period. The record shows that they were separated in time and place and defendant was courteously treated in the interim. The fact that Agent Buscher again advised defendant of his constitutional rights shows that he regarded the interviews as separate. Defendant cites Miranda v. Arizona, 384 U. S. 436 (1966), but nothing in that case forbids a second interview of a defendant who first stated that he did not wish to be questioned "at this time". This Court has recently recognized that a subsequent interview is permissible, even though a defendant makes no admissions during the first interview. Coughlan v. United States, 391 F. 2d 371 (9th Cir. 1968). See also Frizell v. United States, _____ F. 2d _____ (9th Cir. No. 21,433, April 17, 1968).

D. THE TESTIMONY OF DR. POLLACK WAS PROPERLY ADMITTED INTO EVIDENCE.

Dr. Seymour Pollack, a psychiatrist, testified for the government. Defendant urges this court to rule that his entire

testimony should have been stricken because he was told by the Assistant United States Attorney that defendant had confessed to Jerry Bowden. Defendant does not question the good faith of the government since the record shows that this was the testimony expected from Jerry Bowden until shortly before the trial (R. T. 352, 478, 502).

The trial court ruled that defendant could inquire into the bases for Dr. Pollack's opinion and, if he relied on facts not in evidence, argue to the jury that the opinion should be disregarded (R. T. 871). Dr. Davis based his opinion on several facts which were not in evidence, or were contrary to the evidence, and the government's motion to strike his testimony was denied, apparently for the same reason (R. T. 953).

An expert must obtain background information prior to trial in order to give an opinion to the party intending to offer his testimony. At that point nothing is in evidence. In this case, Dr. Pollack was told that Jerry Bowden had confessed. He also received hospital records and information which corresponds to the testimony of William Nagle (R. T. 949-951). Dr. Pollack testified that the information that defendant had confessed was not significant to his opinion since his primary concern was defendant's mental state at the time of the offense. In addition, he did not consider the statement in the context of a confession. He stated that psychiatrists do not rely on any statements attributed to an individual with a severe alcoholic history (R. T. 963-966).

The government submits that this Court should not prevent

a psychiatrist from considering any information which may be relevant to his opinion. A leading case is Jenkins v. United States, 307 F. 2d 637 (D. C. Cir. 1962), (en banc). There the court said, in reversing the trial court because it excluded a psychiatrist's opinion:

> "It is at least as likely, however, that the court predicated its ruling on cases which bar an expert's opinion based upon facts not in evidence unless it is derived solely from his own observations. But we agree with the leading commentators that the better reasoned authorities admit opinion testimony based, in part, upon reports of others which are not in evidence but which the expert customarily relies upon in the practice of his profession. The Wisconsin Supreme Court has forcefully stated the policy underlying the application of this rule to medical testimony:
>
> " 'In order to say that a physician, who has actually used the result of . . . tests in a diagnosis . . . may not testify what that diagnosis was, the court must deliberately shut its eyes to a source of information which is relied on by mankind generally in matters that involve the health and may involve the life of their families and of themselves -- a source of information that is essential that the court should possess in order that it may do justice

between these parties litigant.

" 'This court . . . will not close the doors of the courts to the light which is given by a diagnosis which all the rest of the world accepts and acts upon, even if the diagnosis is in part based upon facts which are not established by the sworn testimony in the case to be true.' " 307 F. 2d at 641.

Defendant apparently contends that the opinion of any expert witness who consults with either attorney and learns facts which are ruled inadmissible into evidence, not introduced into evidence or contrary to the evidence at trial must be stricken. Obviously such a rule would severely limit the value of expert testimony since experts would be denied access to all information possessed by either side before trial. The trial court adopted a more reasonable approach when it, in effect, ruled that the weight to be given an opinion based on misinformation is a question for the jury.

The government respectfully suggests that this Court adopt a rule which would allow an expert to consult freely with the party offering his testimony and anyone else who may be of assistance to him. At trial the expert should be required to state his opinion based on a hypothetical question limited to facts in evidence. Any other facts which he considered may be brought out on cross-examination and, if those facts are not in evidence, the jury will be entitled to give less weight to his opinion.

There are additional reasons for affirming the trial court's

refusal to strike Dr. Pollack's testimony. Defendant urged the trial court to allow impeaching evidence to be admitted substantively. He cannot now complain that the evidence was considered by the government's expert witness. See discussion in Section B, supra. In addition, the record does not clearly demonstrate that Dr. Pollack was discussing the defendant's conversation with Mr. Bowden when he referred to a confession. He may have been referring to the testimony of William Nagle which was admitted without objection. Any statements made by defendant to Mr. Bowden are merely cumulative when added to the testimony of Nagle, Bowden and Agent Buscher. Finally, the facts of the "confession" to Jerry Bowden were before the jury. It must be presumed that they were aware of its weakness as evidence of both defendant's guilt and his mental condition.

E. THE COURT PROPERLY REFUSED TO GIVE DEFENDANT'S REQUESTED INSANITY INSTRUCTION WHICH EMBODIED THE A. L. I. TEST.

Defendant requested an insanity instruction patterned after the A. L. I. test. A. L. I. Model Penal Code, Section 4. 01. The court gave an instruction which substantially followed Mathes and Devitt, Section 10. 14, in accordance with this Court's decision in Sauer v. United States, 241 F. 2d 640 (9th Cir. 1957), cert. denied 354 U. S. 940. The question of the proper test for insanity is one of the most passionately debated issues in criminal

law. This Court recently decided to retain the present rule after a thorough discussion of the alternatives. Ramer v. United States, 390 F. 2d 564 (9th Cir. 1968), (en banc). See also Kilpatrick v. United States, 372 F. 2d 93, cert. denied 387 U. S. 922; Maxwell v. United States, 368 F. 2d 735 (9th Cir. 1966); Smith v. United States, 342 F. 2d 725 (9th Cir. 1965). Another discussion of the question is unnecessary in this case. The government's views were set forth at length in the Appellee's Supplemental Brief in Ramer.

In this case the defense of insanity was based on defendant's contention that he had no memory of the period when the theft occurred. Dr. Pollack testified that defendant had "a rather selective memory, excluding mainly that Friday, Saturday and Sunday." (R. T. 861). He implied that defendant was faking a loss of memory, or dissociative state (R. T. 865). The jury apparently believed Dr. Pollack. If the trier of fact is convinced that defendant remembers what happened and that is the cornerstone of the defense, there is no basis for finding him insane under any test. Ramer v. United States, supra at 575.

CONCLUSION

For the reasons stated in the argument, the judgment of the District Court should be affirmed.

Respectfully submitted,

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